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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 249

HAROLD C. FULLER, *Petitioner,*

v.

STATE OF ALASKA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

HAROLD C. FULLER, *Petitioner,*

v.

STATE OF ALASKA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

OPINIONS BELOW

The opinion of the Supreme Court of Alaska is reported at 437 P.2d 772. The Superior Court of Alaska, Fourth Judicial District, wrote no opinion.

JURISDICTION

This Court has jurisdiction under 28 U.S. § 1257(3). This Petition is not timely filed within the period prescribed by Rule 22(1) of this Court. For reasons stated at pp. 6-7, *infra*, we submit that this defect is not jurisdictional and urge that the requirements of the rule be waived in this case.

QUESTION PRESENTED

May evidence obtained in violation of 47 U.S.C. § 605 be admitted in evidence in a criminal trial in a state court?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves Article VI, cl. 2, of the United States Constitution (the Supremacy Clause) and § 605 of the Federal Communications Act, 48 Stat. 1064, 1103, 47 U.S.C. § 605. They are reprinted in Appendix B, *infra*.

STATEMENT OF THE CASE

Petitioner, Harold C. Fuller, was convicted of "shooting with intent to kill or wound" and sentenced to 10 years in prison by the Superior Court of Alaska, Fourth Judicial District.

It was the theory of the prosecution – and the court below held that there was sufficient evidence for the jury to convict on that theory (App. pp. A-7–A-9)–that petitioner's co-defendant Lester James Brown, also known as Toni Dutra, had shot one Myron Gutman in September 1965, and that petitioner had hired Brown to perform this act.

The pertinent facts can be briefly summarized. Petitioner and his wife, Juanita, became acquainted with Gutman and his wife became particularly friendly with him, whereupon Petitioner divorced her. (Tr. 114, 151, 283). In November 1963, petitioner came to Gutman's house when his wife was there, fought with Gutman, and threatened that he would see Gutman dead within six months. (Tr. 152-153). After the divorce, petitioner moved from Fairbanks but Juanita remained and cared for their children.

In August of 1965 "Toni Dutra" came to Fairbanks (Tr. 165). "Dutra" carried a gun in a shoulder hol-

ster (Tr. 168) and reported that he was in Fairbanks "to shoot a man." (Tr. 723). He never contacted Juanita Fuller but he showed considerable interest in Myron Gutman. He called at Gutman's place of business (Tr. 258) and scouted his home. (Tr. 189-190). On August 26, 1965, "Dutra" contacted Gutman on the pretext of purchasing an automobile from him. (Tr. 261). During the demonstration ride "Dutra" drew a pistol and shot Gutman twice just below the heart. (Tr. 198). There was no apparent motive and no prior threat or warning of the shooting. (Tr. 267).

While in Fairbanks, "Dutra" had received a cryptic telegram whose admissibility is the issue raised by this Petition. The telegram was addressed to "Toni Durta" at the Nordale Hotel at Fairbanks, Alaska, and read as follows:

> HI SON. I GOT A CALL FROM NEW YORK AND I MUST BE ON THE EAST COAST MONDAY MORNING FOR AN IMPORTANT MEETING. THIS SHOULD NOT CHANGE YOUR PLANS FOR A NICE VACATION. WHEN YOU RETURN TO TOWN STAY AT TOWN CENTRE MOTEL, FIRST AND LINCOLN. ASK DESK CLERK FOR LETTER FROM YOUR FRIEND LESTER BROWN CONTAINING CAR CLAIM CHECK AND A SMALL BIRTHDAY GIFT. I WILL BE LEAVING SUNDAY BUT WILL CALL YOU AT THIS MOTEL EVERY DAY STARTING MONDAY. I WILL PLACE CALLS AT 7 AM AND 7 PM UNTIL YOU ARRIVE. IF YOU ARE NOT BACK BY WEDNESDAY I WILL CALL NORDALE AS PRE ARRANGED. I FEEL RATHER GOOD THAT MY COMPANY FEELS I AM THIS IMPORTANT. BE CAREFUL AND DO NOT BE CONCERNED ABOUT THIS CHANGE IN PLANS. ACKNOWLEDGE RECEIPT OF THIS COMMUNICATION VIA WIRE.

It was signed "Bill Durta," Room 807, Ridpath Hotel, Spokane, Washington.

This telegram was a major link by which the prosecution tied petitioner to his co-defendant[1] and to the crime.[2] Its theory was that the telegram instructed "Dutra" how to collect the money for the shooting, that "Dutra" followed those instructions, and that petitioner was the person who sent the telegram. Petitioner's former wife identified the

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[1] In October 1965, Petitioner wrote Juanita a letter in which he stated that he had made the mistake of hiring Brown to look into the welfare of the children.

[2] In his summation to the jury the prosecuting attorney argued as follows:

> " The crime with which we are involved here was a vicious crime. Myron Gutman, I submit, was shot and shot not accidentally, but with the intent of the assailant that he be wounded or that he be killed. That is the nature of the case which you have to weigh here today. Do not deal lightly, do not deal heavily with the telegram which was placed in evidence. Read it, read it with consideration to all the facts in this case, Is it so frivolous? Are we to expect that if the wire fulfilled the function which we believe that it fulfilled, that it would have contained other than innocuous language? Is the suggestion that if the wire means anything it must have said, "Lester Brown, go out and kill * * * Mike Gutman. Signed Harold Fuller." Is that what we should expect? Or should we expect something to be not quite so abrupt, not quite so direct? Can't we expect that the true intent and the true purpose and the true communication might be somewhat glossed over to the point that without viewing the situation with respect to other facts in evidence, without viewing it in respect to the fact that Lester Brown on the 27th checked in to the Towne Centre Motel in Spokane, received the item which the telegram refers to, opened it and it had the contents that the telegram refers to. Is this a mere coincidence? I submit that it is not a mere coincidence. That the telegram indicates a connection between these two persons prior to August 26th, 1965." (Tr. 997-998).

signature on the registration card as that of petitioner.

At the trial, two copies of the telegram were introduced (Ex. P & Q). Petitioner made timely objection to its admissibility, *inter alia* on the ground that it had been obtained in violation of federal law.[3] On appeal, the Supreme Court of Alaska affirmed his conviction. It held that the telegram was admissible even if it had been obtained in violation of § 605 of the Federal Communications Act:

> "Although this statute makes no reference to admissibility of evidence, it has been construed to render inadmissible in a court of the United States communications intercepted and sought to be divulged in violation thereof . . . . But this does not mean that the statute makes such communications inadmissible in a state court. In *Schwartz* v. *Texas* the United States Supreme Court held that section 605 of the Federal Communications Act applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings. Since the federal statute has no effect on state court proceedings, appellant's contention that the telegram was inadmissible because of the statute has no merit, and it is therefore unnecessary for us to decide whether the telegram was in fact obtained in violation of the federal statute. Other state courts have reached similar results." (App. A, pp. A-3–A-4, footnotes omitted.)

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[3] It was also objected to unsuccessfully that there was insufficient proof of petitioner's authorship of the telegram. See App., pp. A-5–A-7, where this contention is rejected by the court below.

Mr. Justice Rabinowitz filed a concurring opinion. (App. p. A-10). He stated that petitioner had failed to carry the burden of proving a violation of § 605 of the Communications Act. Accordingly, he found it "unnecessary to decide whether as a matter of policy, our courts should countenance a violation of section 605 in any court proceeding." (*Id.*)

THE PETITION SHOULD BE ENTERTAINED ON THE MERITS ALTHOUGH NOT TIMELY FILED

The opinion of the Supreme Court of Alaska was entered on March 1, 1968. Its mandate (Appendix B, *infra*) was issued to the Superior Court on March 12, 1968. On whichever date as the time for filing the petition for certiorari began to run, this petition is out of time under Rule 22(1) of this Court. However, we submit that the Rule is not jurisdictional and urge that the Rule be waived in this case and that this Petition be entertained on the merits.

In *Heflin* v. *United States*, 358 U.S. 415, 418, n. 7, it was held that a petition for certiorari to a United States Court of Appeals in a criminal case may be entertained even if it is filed after the passage of the thirty days prescribed in Rule 22(2). The Court determined that "no jurisdictional statute is involved" and accordingly, that the requirement of the rule could be waived. The reasoning of the *Heflin* case governs the jurisdictional question here. Congress likewise did not fix the time for filing a petition for certiorari in the state court in a criminal case, but authorized this Court to fix the time by rule 28 U.S.C. § 2101(d).[4]

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4 On the other hand, the time to file a petition for certiorari in civil cases has been established by Congress in 28 U.S.C. § 2101(c) and is therefore jurisdictional. See Wallace v. Virginia, 392 U.S. - - -, 36 U. S.L.Wk. 3484 (June 17, 1968).

In *Heflin* "the majority agree[d]to dispense with the requirements of our rule in order to avoid wasteful circuity" 358 U.S. at 419, n. 7. The Court reasoned that if certiorari were denied Heflin would have been able to raise the same question by a renewed application for post-conviction relief. The constitutional question presented by petitioner can also be presented in an application for post-conviction relief, in the federal courts, even if no petition for certiorari were filed. *Fay* v. *Noia*, 372 U.S. 391. Accordingly, this is one of the rare occasions on which waiver of the Rule would not frustrate its purpose but would rather promote the objective of speedy disposition of litigation. Nor would respondent State be prejudiced by waiver even it be assumed that a State has a legitimate interest in retaining a conviction which was obtained in violation of federal law as authoritatively declared by this Court. Because post-conviction remedies are available to petitioner, the State, unlike a prevailing party in civil litigation, would not obtain a final determination even if certiorari were denied.

REASONS FOR GRANTING THE WRIT

The Judgment of the Court Below Is Based On a Precedent Which Has Now Been Overruled by This Court

Petitioner argued in the court below that the "Durta" telegram should not have been admitted into evidence against him because it had been obtained in violation of § 605 of the Federal Communications Act. The Supreme Court of Alaska rejected this contention on the sole ground that "the federal statute has no effect on state court proceedings" (App. A, pp. A-3–A-4, *infra*), basing that conclusion on *Schwartz v. Texas*, 344 U.S. 199 (1952). However, on June 17, 1968, this Court expressly overruled *Schwartz* and squarely held that § 605 does prohibit the divulgence in a state court of communications obtained in violation of § 605. *Lee* v. *Florida*, 392 U.S. - - -, 36 U.S.L.Wk. 4652. The judgment of

the court below thus rests on an interpretation of a federal statute which has since been disapproved by this Court, and should therefore be reversed.

In the court below, the state contended in the alternative that the telegrams had not been illegally obtained. The concurring Justice expressed the view that the burden of proving a violation was on the defendant, and that defendant had failed to meet this burden, without, however, explaining the basis of his conclusion. This circumstance does not militate against reversal of this case on the authority of *Lee*. Consistent with its view that the legality of the evidence was irrelevant to admissibility, the majority below neither expressed its own view on the burden of proof nor discussed the pertinent record evidence. This Court's normal procedure when it adopts new doctrine is to leave to the lower courts the determination whether it is applicable to pending cases. For example, after *Bruton* v. *United States*, 391 U.S. - - -, decided May 20, 1968, this Court granted certiorari in a series of cases and remanded them for reconsideration in light of *Bruton*, although it was not clear on the face of the papers that the petitioners were entitled to the benefits of the new rule.[5] The same course should be followed here.

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[5]For example, in Nelson v. United States, 392 U.S. - - -, 36 U.S.L. Wk. 3472, the co-defendants' confession did not refer to petitioner by name. Accordingly, the United States argued in its Brief in Opposition that petitioner had no standing to object to its admission. Brief for the United States in Opposition, p. 7, No. 78, Misc., Oct. Term, 1967. Nevertheless, the Petition was granted with directions to the lower court to reconsider the case in light of Bruton.

CONCLUSION

By reason of the foregoing, this petition for a writ of certiorari should be granted, and the cause remanded to the Supreme Court of Alaska for further consideration, in light of *Lee* v. *Florida, supra.*

Respectfully submitted,

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APPENDIX A

OPINION AND MANDATE OF THE SUPREME COURT OF ALASKA

THE SUPREME COURT OF THE STATE OF ALASKA

HAROLD C. FULLER, *Appellant,*	)	
v.	)	File No. 751
STATE OF ALASKA, *Appellee.*	)	OPINION
	)	[No. 459-March 1, 1968]

Before: Nesbett, Chief Justice, Dimond and Rabinowitz, Justices.

DIMOND, Justice.

A jury found appellant guilty of the crime of shooting with intent to kill or wound. He has appealed, claiming that the judgment of conviction should be reversed because certain evidence was erroneously admitted and because of the insufficiency of the evidence to support the verdict.

A man named Lester James Brown, also known as Tony Dutra, was the person charged with the actual shooting.[1]

[1]Brown was tried with appellant and convicted of the crime of shooting with intent to kill or wound. He has not appealed.

The state's theory of appellant's guilt was that he had hired Brown to do the shooting.

Over appellant's objection the state introduced in evidence exhibits P and Q. Exhibit P was a copy of a telegram obtained from the Fairbanks, Alaska office of the Alaska Communications System which was the receiving station, and exhibit Q was a copy of the same telegram obtained from the originating office of Western Union at Spokane, Washington. The telegram was addressed to Toni Durta at the Nordale Hotel at Fairbanks, Alaska,[2] and stated as follows:

> HI SON. I GOT A CALL FROM NEW YORK AND I MUST BE ON THE EAST COAST MONDAY MORNING FOR AN IMPORTANT MEETING. THIS SHOULD NOT CHANGE YOUR PLANS FOR A NICE VACATION. WHEN YOU RETURN TO TOWN STAY AT TOWN CENTRE MOTEL, FIRST AND LINCOLN. ASK DESK CLERK FOR LETTER FROM YOUR FRIEND LESTER BROWN CONTAINING CAR CLAIM CHECK AND A SMALL BIRTHDAY GIFT. I WILL BE LEAVING SUNDAY BUT WILL CALL YOU AT THIS MOTEL EVERY DAY STARTING MONDAY. I WILL PLACE CALLS AT 7 AM AND 7 PM UNTIL YOU ARRIVE. IF YOU ARE NOT BACK BY WEDNESDAY I WILL CALL NORDALE AS PRE ARRANGED. I FEEL RATHER GOOD THAT MY COMPANY FEELS I AM THIS IMPORTANT. BE CAREFUL AND DO NOT BE CONCERNED ABOUT THIS CHANGE IN PLANS. ACKNOWLEDGE RECEIPT OF THIS COMMUNICATION VIA WIRE.

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[2]The telegram was signed by Bill Durta. The state's theory of the case was that Bill Durta was in reality the appellant, Harold Fuller.

Appellant contends that it was error to admit the telegram in evidence because it had been obtained in violation of section 605 of the Federal Communications Act which, in pertinent part, provides:

> No person receiving . . . any interstate . . . communication by wire or radio shall divulge or publish the . . . contents . . . thereof, except through authorized channels of transmission or reception . . . or in response to a subpoena issued by a court of competent jurisdiction . . . .[3]

Although this statute makes no reference to admissibility of evidence, it has been construed "to render inadmissible in a court of the United States communications intercepted and sought to be divulged in violation thereof . . . ."[4] But this does not mean that the statute makes such communications inadmissible in a state court. In *Schwartz* v. *Texas* the United States Supreme Court held that section 605 of the Federal Communications Act "applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings."[5] Since the federal

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[3]Act of June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103, 47 U.S.C.A. § 605 (1962).

[4]Schwartz v. Texas, 344 U.S. 199, 201, 97 L.ed.231, 234 (1952), citing Nardone v. United States, 302 U.S. 379, 82 L.ed. 314 (1937).

[5]Note 4 supra, at 203, 97 L.ed. at 236. The doctrine of this case was reaffirmed in Pugach v. Dollinger, 365 U.S. 458, 5 L.ed. 2d 678 (1962). See also Benanti v. United States, 355 U.S. 96, 101, 2 L.ed. 2d 126, 131 (1957).

statute has no effect on state court proceedings, appellant's contention that the telegram was inadmissible because of the statute has no merit, and it is therefore unnecessary for us to decide whether the telegram was in fact obtained in violation of the federal statute. Other state courts have reached similar results.[6]

Appellant attempts to escape the effect of *Schwartz* by arguing that the doctrine of that case does not apply to federally owned and operated telegraph facilities, such as the Alaska Communications System.[7] There is nothing in *Schwartz* or in the federal act to suggest such a result, and appellant points to no authority which would tend to support this argument.

Appellant does not refer to the Alaska statute similar to section 605 of the federal act. AS 11.60.280, like the Federal Communications Act, makes it unlawful for one receiving or transmitting a communication by wire or radio to divulge the communication, except in enumerated

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[6]Griffith v. State, 111 So.2d 282, 284-86 (Fla. App), cert. denied, 114 So.2d 6 (Fla. 1959); Commonwealth v. Brinkley, 362 S.W.2d 494, 496 (Ky. 1962); People v. Maranian, 359 Mich. 361, 102 N.W. 2d 568, 572-74 (1960); State v. Giardina, 27 N.J. 313, 142 A.2d 609, 610 (1958); People v. Dinan, 11 N.Y.2d 350, 229 N.Y.S. 2d 406, 183 N.E.2d 689, 690-91, cert. denied, Dinan v. New York, 371 U.S. 877, 9 L.ed.2d 115 (1962); People v. Variano, 5 N.Y. 2d 391, 185 N.Y.S.2d 1, 157 N.E.2d 857, 858 (1959); Commonwealth v. Chaitt, 380 Pa. 532, 112 A.2d 379, 383, cert. denied, 350 U.S. 829, 100 L.ed. 740 (1955); Commonwealth v. Voci, 185 Pa. Super. 563, 138 A.2d 232, 233, aff'd, 393 Pa. 404, 143 A.2d 652, cert. denied, 358 U.S. 885, 3 L.ed.2d 113 (1958); State v. Jennen, 58 Wash.2d 171, 361 P.2d 739, 740 (1961).

[7]The Alaska Communications System is owned by the United States and operated by the United States Air Force.

instances.[8] Probably this statute was not relied upon by appellant for the reason that it did not become effective until August 1, 1966, which was more than three months after appellant's trial had concluded. The statute does not purport to have retrospective operation, and we have held that when this is the case a statute will be construed to operate prospectively only.[9]

Appellant contends that the court erred in admitting the telegram in evidence "for want of legal foundation." It is apparently appellant's contention that it was not established that appellant had been the author and sender of the telegram involved in this case.

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[8] AS11.60.280 provides in part:

> (a) It is unlawful for a person who receives or assists in receiving, or who transmits or assists in transmitting a communication by wire or radio to divulge or publish the existence, contents, substance, purport, effect, or meaning of the communication, except through authorized channels of transmission or reception to
>
> (1) the addressee, his agent, or attorney;
>
> (2) a person employed or authorized to forward a communication to its destination;
>
> (3) proper accounting or distributing officers of the various communicating centers over which the communication may be passed;
>
> (4) the master of a ship under whom he is serving;
>
> (5) another on demand of lawful authority; or
>
> (6) in response to a subpoena issued by a court of competent jurisdiction.

[9] Watts v. Seward School Bd., 421 P.2d 586, 602-03 (Alaska 1966), reh. denied, 423 P.2d 678 (Alaska 1967), appeal pending; Stephens v. Rogers Constr. Co., 411 P.2d 205, 208 (Alaska 1966); Hill v. Moe, 367 P.2d 739, 742 (Alaska 1961), cert. denied, 370 U.S. 916, 8 L.ed.2d 498 (1962). AS 01.10.090 provides: "No statute is retrospective unless expressly declared therein."

Proof of authorship or identity of the sender of a telegram is a prerequisite to its admission into evidence.[10] But it is not required that the proof be direct – the authenticating evidence may be indirect and circumstantial.[11]

The district manager of Western Union at Spokane, Washington, testified that the telegram involved was sent from Spokane on August 20, 1965. He also said that the telegram message came into the office by telephone. The auditor at the Ridpath Hotel in Spokane first testified as to the registration and billing procedure at the hotel, which included signing a registration card. The state then introduced in evidence a registration card for the Ridpath Hotel for Room 807, signed by Harold C. Fuller, showing a check-in date of August 17, 1965 and a sign-out date of August 22, 1965. On the ledger card for Room 807 during this period was recorded an $18.71 charge for a telegram sent on August 20, 1965, which charge had been paid. The auditor at the Ridpath Hotel explained that the telegraph office calls the hotel when a telegram is sent and the hotel then posts the charge for the telegram to the guest's account. The telegram involved here was signed by Bill Durta, Room 807, Ridpath Hotel, Spokane, Washington. Juanita Fuller, appellant's former wife, identified the signature on the registration card as that of appellant, Harold C. Fuller.

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[10] Harlow v. Commonwealth, 204 Va. 385, 131 S.E.2d 293, 296, 5 A.L.R.3d 1012, 1016-17 (1963); Annot., 5 A.L.R.3d 1018 (1966).

[11] Ford v. United States, 10 F.2d 339, 350 (9th Cir. 1926), aff'd, 273 U.S. 593, 71 L.ed. 793 (1927); Lundgren v. Union Indem. Co., 171 Minn. 122, 213 N.W. 553, 554-55, 52 A.L.R. 580 (1927); Ridings v. State, 108 Neb. 804, 189 N.W. 372, 373 (1922).

In summary, the foregoing evidence shows that a telegram was sent and paid for by the occupant of Room 807, Ridpath Hotel, Spokane, Washington, on August 20, 1965, that a telegram sent from Spokane, Washington to Tony Durta in Fairbanks, Alaska on August 20, 1965 was purportedly sent by a Bill Durta, Room 807, Ridpath Hotel, Spokane, Washington, and that the occupant of Room 807 of the Ridpath Hotel on that date was in reality the appellant, Harold C. Fuller. From this evidence reasonable minds could infer that appellant was the author and sender of the telegram involved in this case.[12] There was a prima facie showing to that effect which was sufficient to justify admitting the telegram into evidence.[13]

Appellant argues that the trial court erred in not granting appellant's motion for a judgment of acquittal. He contends that there was insufficient evidence of guilt to allow the question of guilt or innocence to go to the jury for determination.

As to such contention we said quite recently in Gargan v. State:[14]

> When presented with a specification of error of this nature, this court will consider "only those facts in the record most favorable to the state and such reasonable inferences as the jury may have drawn from them . . . ." The record is reviewed in this light in order to ascertain whether "fair minded men in the exercise of reasonable judgment could have differed on the question of whether guilt had been established beyond a reasonable doubt."

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[12]Lundgren v. Union Indem. Co., note 11, supra, 213 N.W. at 554-55.

[13]Selman v. State, 411 P.2d 217, 223 (Alaska 1966).

[14]Opinion No. 452, P.2d . (Alaska 1968).

If such fair-minded men could have so differed, then the question of guilt or innocence is properly one for the jury to determine.[15]

The state's theory of the case was that appellant had hired Lester Brown, also known as Tony Dutra, to kill Mike Gutman. There was evidence of motive. Juanita Fuller, appellant's former wife, testified that in November 1963, after she had divorced appellant, the latter came to Gutman's house in an angry state and fought and scuffled with Gutman. She said that appellant threatened that he would see Gutman dead within six months. Such a threat was verified by the testimony of Gutman.

There was evidence that Lester Brown, also known as Tony Dutra, did the actual shooting. Several different threads of evidence tied appellant to Brown. There was testimony that Brown received a telegram sometime in August 1965 while in Fairbanks, Alaska. We have already discussed the evidence from which it could be inferred that appellant had sent a telegram to Brown, using the name Tony Dutra, on August 20, 1965, giving him explicit directions as to things he was to do when he left Fairbanks for Spokane. There was evidence showing that following the shooting Brown did leave Fairbanks, that he went to Spokane, and that he followed the directions given to him by appellant in the telegram. There was testimony that Brown had held himself out to be a private investigator and that he was in Fairbanks "to shoot a man." There was no evidence that Brown had known Gutman and had any reason personal to himself to shoot Gutman. Juanita Fuller

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[15]Battese v. State, 425 P.2d 606, 610 (Alaska 1967); Maze v. State, 425 P.2d 235, 239 (Alaska 1967); Allen v. State, 420 P.2d 465, 467-68 (Alaska 1966); Bush v. State, 397 P.2d 616, 618 (Alaska 1964).

testified that Brown had contacted her while in Fairbanks and told her he knew appellant. There was evidence that appellant wrote a letter to Juanita Fuller in October 1965 in which he stated that he had made the mistake of hiring Lester Brown to look into the welfare of his children.

From this evidence we believe that fair-minded men in the exercise of reasonable judgment could have differed on the question of whether it had been established beyond a reasonable doubt that appellant had hired Lester Brown to go to Fairbanks to shoot Gutman, and thus carry out appellant's threat that he would see Gutman dead. The case was properly submitted to the jury. It was not error to deny appellant's motion for a judgment of acquittal.

The judgment is affirmed.

RABINOWITZ, Justice, concurring.

In my opinion the initial burden of proving a violation of section 605 of the Federal Communications Act was upon appellant.[1] Study of the trial record reveals that appellant did not meet this burden. I, therefore, concur in the result reached by this court concerning the superior court's admission into evidence of the telegram.[2] In light of this conclusion, I find it unnecessary to decide whether, as a matter of policy, our courts should countenance a violation of section 605 in any court proceeding.[3]

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[1]Compare Nardone v. United States, 308 U.S. 338, 341-42, 84 L.Ed. 307, 312 (1939); United States v. Morin, 378 F.2d 472, 475 (2d Cir. 1967); United States v. Agueci, 310 F.2d 817, 834 (2d Cir. 1962), cert. denied, 372 U.S. 959, 10 L.Ed.2d 12 (1963); United States v. Coplon, 185 F.2d 629, 636 (2d Cir. 1950), cert. denied, 342 U.S. 920, 96 L.Ed. 688 (1952).

[2]I also concur in the court's disposition of the foundation issue in regard to the admissibility of the telegram and in the decision reached concerning the judgment of acquittal issue.

[3]See State v. Giardina, 27 N.J. 313, 142 A.2d 609, 610 (1958); People v. Dinan, 11 N.Y.2d 350, 183 N.E.2d 689, 691-92 (1962).

THE SUPREME COURT OF THE STATE OF ALASKA

HAROLD C. FULLER, Appellant,	)	
v.	)	File No. 751
STATE OF ALASKA, Appellee.	)	MANDATE

To: Superior Court of the State of Alaska,
Fourth Judicial District, at Fairbanks.

Harold C. Fuller filed an appeal from a judgment of the Superior Court, Fourth Judicial District at Fairbanks in Criminal Action No. 65-95, entitled "STATE OF ALASKA, Plaintiff, vs. HAROLD C. FULLER, Defendant." The case was considered on the briefs submitted. On March 1, 1968 the court filed its written opinion and entered judgment affirming the judgment of the superior court.

It Is ORDERED:

The judgment of the Superior Court, entered June 6, 1966, is affirmed.

WITNESS The Honorable Buell A. Nesbett, Chief Justice of the Supreme Court, State of Alaska, this 12th day of March, 1968.

/s/ JOSEPHINE M. McPHETRES
Clerk, Supreme Court
State of Alaska

APPENDIX B

Constitution and Statute Involved

United States Constitution, Article VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 605 of the Federal Communications Act, 48 Stat. 103:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, ~~su~~bstance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents,

substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit or another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19,1934, c. 652, Title VI, § 605, 48 Stat. 1103.

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No. 249

Supreme Court of the United States

OCTOBER TERM, 1968

HAROLD C. FULLER, *Petitioner,*

v.

STATE OF ALASKA, *Respondent.*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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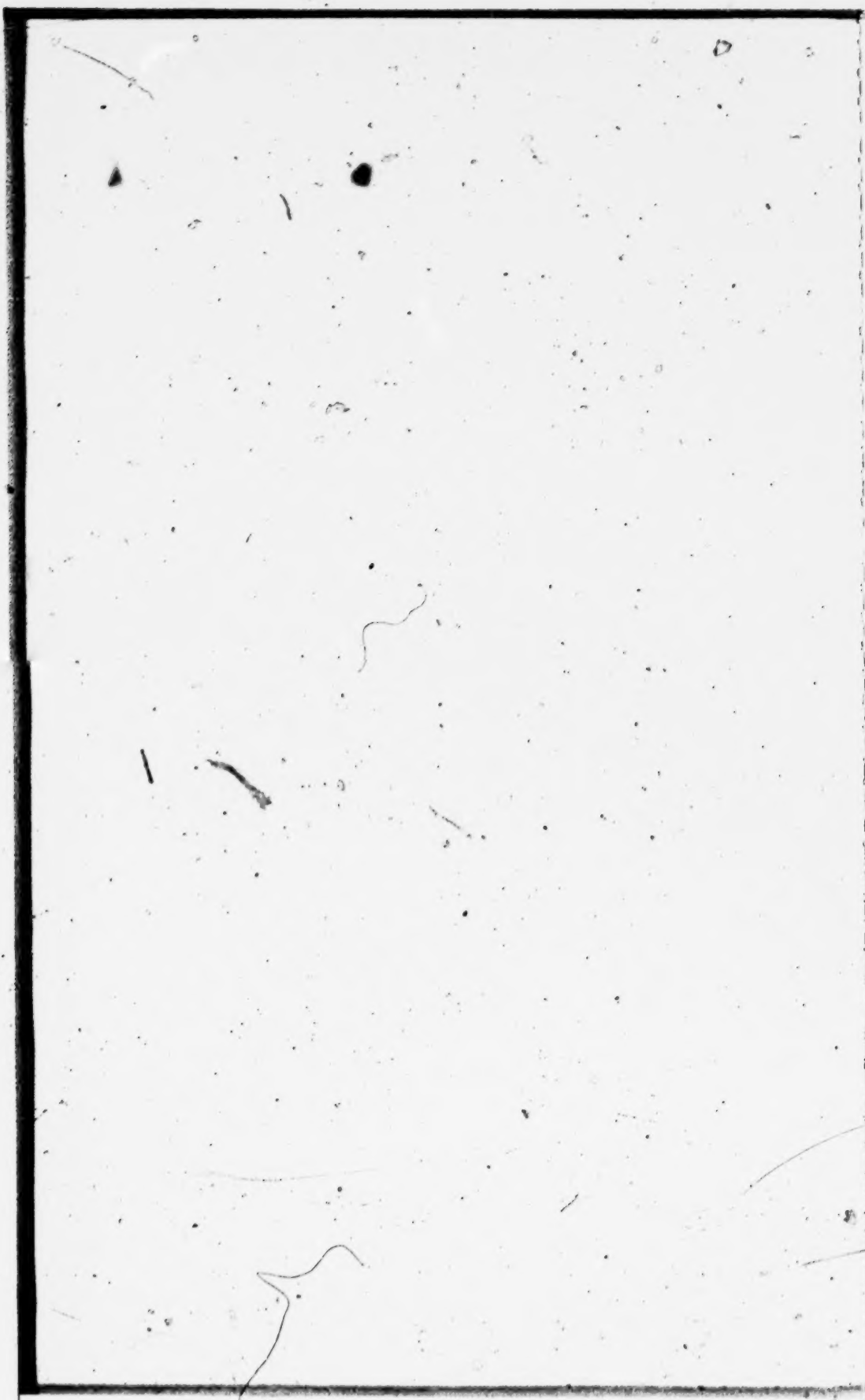
THE ARGUS PRESS SEATTLE, WASHINGTON



No. 249

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Supreme Court of the United States

OCTOBER TERM, 1968

HAROLD C. FULLER,	*Petitioner,*	No. 249
v.		
STATE OF ALASKA,	*Respondent,*	

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

SUPPLEMENTAL STATEMENT OF THE CASE

The following facts omitted by Petitioner are relevant to the issues herein:

At the time of imposition of sentence by the Superior Court of Alaska, Fourth Judicial District, in May of 1965, Petitioner was allowed to continue his release on bond pending appeal. Petitioner's release was expressly conditioned, however, upon his remaining within the United States. Contrary to this express limitation imposed by the Court, Petitioner absconded from the State of Alaska and subsequently from the United States and has traveled to the Republic of Viet Nam.

Warrants of arrest for the Petitioner, a fugitive felon who has absented himself from the jurisdiction of this Court, have been issued by the Superior Court of Alaska, Fourth Judicial District, (App. 1) and by the United States District Court, District of Alaska,

pursuant to the Federal Fugitive Felon Act (App. 2) and are presently outstanding.

OBJECTIONS TO JURISDICTION

Respondent, State of Alaska, contends that this Court should exercise no jurisdiction in this matter because the Petitioner, Harold C. Fuller, has illegally fled the jurisdiction of the courts of the State of Alaska and of the United States, thereby manifesting his refusal to submit to their jurisdiction and abide by the lawful orders thereof. Accordingly, Petitioner should not be entitled to invoke the jurisdiction of this Court since this Court has no jurisdiction over the person of the Petitioner.

The Respondent further objects to the Court assuming jurisdiction in this case on the ground the Petition was not timely filed within the period prescribed by Rule 22(1), of this Court, and that this Petitioner has not shown himself worthy of a waiver of time or other special consideration by this Court.

QUESTIONS PRESENTED

Would the decision of this Court in *Lee v. Florida,* 392 U.S. ....., 36 U.S.L.Wk. 4652, decided June 17, 1968, relative to the admission in a state criminal trial of evidence obtained in violation of Sec. 605, Federal Communications Act, require reversal of an April, 1965, state conviction obtained during the life of *Schwartz v. Texas,,* 344 U.S. 199 (1952)?

REASONS FOR DENYING THE WRIT

The Respondent has asserted throughout appellate

procedures in this case that no violation of Sec. 605 of the Federal Communications Act is involved. The concurring opinion in the Alaska Supreme Court demonstrated that no such violation was established by the Petitioner at trial. If it can be assumed, arguendo, that a violation was present, relevant decisions of this Court indicate that the decision in *Lee v. Florida,* 392 U.S. ....., 20 L.Ed.2d 1166 (June 17, 1968), should not be applied retroactively so as to affect evidentiary rulings in a trial completed thirty-eight (38) months earlier.

The telegraphic communication drawn in question by this Petition would be rendered no less probative or reliable had it been obtained in violation of Federal law. The manner of producing this telegram in question cannot be said to "affect the very integrity of the fact-finding process" or present the "clear danger of convicting the innocent." *Linkletter v. Walker,* 381 U.S. at 639, 14 L.Ed.2d at 614 (1965).

The tests applied by this Court in *Linkletter v. Walker, supra; Tehan v. Shott,* 382 U.S. 406, 15 L.Ed. 2d 453 (1960); *Johnson v. New Jersey,* 384 U.S. 719 (1966); and, *Stovall v. Denno,* 388 U.S. 293, 18 L.Ed. 2d 1199 (1967), denying retroactive application to *Mapp v. Ohio, Griffin v. California, Escobedo, Miranda* and *Wade* are applicable here. The decision of the Supreme Court of Alaska, rendered in reliance upon *Schwartz v. Texas,* 344 U.S. 199 (1952), some months before the decision in *Lee v. Florida, supra,* was announced, should be allowed to stand.

CONCLUSION

The decision in *Lee v. Florida, supra,* should be afforded prospective application only. The Petitioner, having voluntarily absented himself from the jurisdiction of the courts of the State of Alaska and of this Court, should be denied his writ.

DATED at Anchorage, Alaska, this 20th day of September, 1968.

Respectfully submitted,

DOUGLAS B. BAILY
District Attorney for the
Third Judicial District
State of Alaska
Attorney for Respondent

1001 Fourth Avenue
Anchorage, Alaska 99501

A-1

IN THE SUPERIOR COURT OF THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA, *Plaintiff,* vs. HAROLD C. FULLER, *Defendant.*		**No. 65-91 Cr. : Bench Warrant**

The State of Alaska:

To: Any peace officer or authorized person:

You are hereby commanded to arrest Harold C. Fuller and bring him forthwith before the Superior Court, 4th judicial district, at Fairbanks, Alaska, to answer to an ..... against him, charging him with the crime of Failure to appear pursuant to Notice to Produce.....in violation of ..... Defendant .....,

Witness the Honorable Warren Wm. Taylor, Judge of said Court, this 24th day of Mareh, 1967.

OLGA T. STEGER
Clerk

By: CAROL FRANCK
Deputy Clerk

WARREN WM. TAYLOR
Superior Court Judge

Bail fixed at $20,000.00.

Return

I hereby certify that I received the within warrant on the ..... day of ....., 19....., at ..... Alaska, and that I

executed the same by arresting the above named defendant, ..., and that I now produce him before .....
.....

Dated at ....., Alaska, this .....day of ....., 19.....

.....

.....

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA v. HAROLD C. FULLER	Commissioner's Docket No. 4, Case No. 30

Complaint for Violation of U.S.C. Title 18, Section 1073

UNLAWFUL FLIGHT TO AVOID CONFINEMENT

Before James A. Hanson, Room 131, Federal Building, Anchorage, Alaska. The undersigned complainant being duly sworn states: That on or about June 6, 1966, at or near Anchorage, Alaska, in the District of Alaska: Harold C. Fuller did unlawfully move and travel in interstate and foreign commerce from Anchorage, Alaska, within the State of Alaska, to some unknown point with intent to avoid confinement in the State of Alaska for the crime of shooting with intent to kill or wound, all in violation of Alaska Statutes 11.15.150 and Title 18, United States Code, Section 1073.

And the complainant states that this complaint is based on statements of his former bondsman and copies of letters from Harold C. Fuller to his bondsman stating that he is in the Saigon area of Vietnam and that due and diligent search has been made within the State of Alaska and he cannot be found within the State of Alaska.

STATE OF ALASKA
UNITED STATES OF AMERICA } ss.

I, the undersigned, certify that this is a true and full copy of an original document on file in the office of the United States Commissioner, District of Alaska.

Witness my hand and the seal of this court this 18th

day of September, 1968, at Anchorage, Alaska.

JAMES A. HANSON
U. S. Commissioner

And the complainant further states that he believes that ..... are material witnesses in relation to this charge.

DOUGLAS B. BAILY
District Attorney
Third Judicial District

Sworn to before me, and subscribed in my presence, May 10, 1968.

JAMES A. HANSON
United States Commissioner

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA,	*Plaintiff,*	No. 65-91 Cr.
v.		
HAROLD C. FULLER,	*Defendant.*	

JUDGMENT AND COMMITMENT

On the 6th day of June, 1966, the attorney for the State of Alaska and the defendant appeared in person and by counsel.

It is adjudged that the defendant has been convicted upon a verdict of guilty of the offense of Shooting With Intent to Kill or Wound as charged in Count II of the Indictment, and the Court having asked the defendant whether he had anything to say

as to why judgment should not be pronounced and no sufficient cause to the contrary having been shown or appearing to the Court,

It is Adjudged that the defendant is guilty and convicted of the offense of Shooting With Intent to Kill or Wound.

It is ordered that the defendant is hereby committed to the care and custody of the Commissioner of the Department of Health and Welfare,, or his authorized representative, for a period of six (6) years and shall be eligible for parole at the discretion of the parole board.

It is further ordered that the defendant shall receive seventeen (17) days credit for time already served.

It is further ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the Commissioner of the Department of Health and Welfare, State of Alaska, or his authorized representative, and that the copy serve as a commitment of the defendant.

Dated at Fairbanks, Alaska, this 6th day of June, 1966.

WARREN WM. TAYLOR
Superior Court Judge

Return

I hereby certify that I received the within Judgment and Commitment on this ..... day of ....., 1966, and that I executed the same by delivering the above-named defendant to the ....., at ....., the institution designated by the custodial officer named therein, on the ..... day of ....., 1966.

STATE OF ALASKA
FOURTH JUDICIAL DISTRICT } ss.

I, the undersigned, certify that this is a true and full copy of an original document on file in the Superior Court, Fourth Judicial District, State of Alaska.

Witness my hand and the seal of this Court this 8th day of June, 1966, at Fairbanks, Alaska.

OLGA T. STEGER
Clerk of the Superior Court

By: JEAN RAE ENGLE
Deputy

STATE OF ALASKA
FOURTH JUDICIAL DISTRICT } ss

I, the undersigned, certify that this is a true and full copy of an original document on file in the Superior Court, Fourth Judicial District, State of Alaska.

Witness my hand and the seal of this court, this 6th day of May, 1968 at Fairbanks, Alaska.

OLGA T. STEGER
Clerk of the Superior Court

By: .....
Deputy

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

WARRANT OF ARREST

UNITED STATES OF AMERICA v. HAROLD C. FULLER	Commissioner's Docket No..... Case No.....

To George A. Bayer, United States Marshall, or any other duly authorized law enforcement officer:

You are hereby commanded to arrest Harold C. Fuller, and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with unlawful flight to avoid confinement in violation of U.S.C. Title, 18, Section 1073 and Alaska Statutes 11.15.150.

Date: May 10, 1968.

JAMES A. HANSON
United States Commissioner

Received ....., 19 at ....., and executed by arrest of ..... at ..... on ..... 19.....

....., *Name*

....., *Title*

..... District of .....

By ....., Deputy

Date: ....., 19.....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 249

HAROLD C. FULLER, *Petitioner,*

v.

STATE OF ALASKA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

PETITIONER'S REPLY MEMORANDUM

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Washington, D.C. 20006

Attorneys for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 249

HAROLD C. FULLER, *Petitioner,*

v.

STATE OF ALASKA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

PETITIONER'S REPLY MEMORANDUM

Respondent does not deny that this Court has power to grant certiorari to review the judgment of the Supreme Court of Alaska in this case—a judgment based on the now discredited authority of *Schwartz v. Texas*, 344 U.S. 199. But respondent urges that the time period established by the Court's rules be strictly enforced against petitioner—although its Brief in Opposition was also filed out of time—because petitioner has failed to comply with the terms of his bail bond. We fail to see that this circumstance is material.[1]

---

[1] Nor, apparently, did respondent, until faced with *Lee v. Florida*, for it did not call this circumstance to the attention of the Supreme Court of Alaska.

Although respondent asserts that petitioner "illegally" left its jurisdiction (Opp. p. 2), Alaska law does not appear to impose sanctions beyond forfeiture of the bail bond;[2] moreover, it is an essential element of the federal offense defined in 18 U.S.C. § 1073 (Opp. p. B-1) that the defendant have the "intent to avoid confinement"—an intent which cannot be assumed, for petitioner's conviction is not final. In any event, if petitioner has broken any law, it would define its own sanctions—and denial of certiorari would not be one of them.

Moreover, while there are cases in which this Court has declined to decide a case where it was evident that the defendant would not submit to an adverse decision,[3] respondent understandably places no reliance on them. Petitioner has not permanently removed himself from the authority of the United States nor otherwise manifested an unwillingness to comply with a final judgment of conviction. As respondent knows, petitioner is in the Republic of VietNam (see Opp. p. 1), where the United States is not without authority or resources to compel his return. Indeed, counsel understand that petitioner is working there for the United States, and have recently received

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[2]It is stated in the Bench Warrant reproduced at Opp. p. A-1 that respondent has charged petitioner "with the crime of failure to appear pursuant to Notice to Produce in violation of . . . ." (The reference to the Alaska statute is also blank in the original of the Warrant.) Research has uncovered no Alaskan statute establishing the "crime of failure to appear pursuant to Notice to Produce." In the complaint reproduced at Opp. p. B-1, reference is made to Alaska Statutes 11.15.150, but this is the provision defining the crime for which petitioner has been convicted in the present case.

[3]*Eisler v. United States*, 338 U.S. 189, 338 U.S. 883; *Bonahan v. United States, Nebraska*, 125 U.S. 692; *Smith v. United States*, 94 U.S. 97.

communications from petitioner sent from an A.P.O. address.[4]

On the merits, respondent reasserts "that no violation of Sec. 605 of the Federal Communications Act is involved," (Opp. p. 3), and declares that this was "demonstrated" by the concurring opinion below. However, since the majority of the Supreme Court of Alaska decided the case on a broader ground, the concurring Justice deemed it unnecessary to elaborate upon his conclusion that § 605 had not been violated (Pet. p. A-10). It therefore bespeaks no disrespect to insist that his views cannot be regarded as dispositive. Nor, of course, would the grant of certiorari decide the point in petitioner's favor. The relief sought in the Petition (pp. 8-9) is for a remand to the Supreme Court of Alaska for reconsideration in light of *Lee v. Florida*—in other words, for a determination whether evidence was introduced against petitioner in violation of § 605.

Respondent urges alternatively that petitioner's conviction should stand despite *Lee*, because his "trial was completed thirty-eight (38) months earlier." (Opp. p. 3). We submit that the cases on which respondent relies are plainly inapposite. There is no reason to believe that violation of § 605 in state court prosecutions has been so pervasive that retroactive application of *Lee* "would seriously disrupt the administration of our criminal laws," *Johnson v. New Jersey*, 384 U.S. 719, 731; *Stovall v. Denno*, 388 U.S. 293, 300. Contrast the potential impact of the overruling decisions discussed in *Stovall*, 388 U.S. at 299-300. Moreover, there is absent here an element strongly emphasized in *Stovall, id.* and *Johnson v. New Jersey*,

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[4]Since respondent has presented facts outside the record, our reply must be based on the facts which counsel are able to represent. In this regard we wish to make clear that since counsel lack physical custody of petitioner, we cannot represent that he will voluntarily return to Alaska.

384 U.S. at 727, for the ruling in *Lee v. Florida* was clearly foreshadowed by prior cases. As the *Lee* opinion explains (392 U.S. 378 at 385), once *Benanti v. United States*, 355 U.S. 96, had been decided, "the only remaining support" for *Schwartz v. Texas, supra*, was *Wolf v. Colorado*, 338 U.S. 25; and that "doctrinal underpinning of the *Schwartz* doctrine was, of course, completely removed by *Mapp v. Ohio*, 367 U.S. 643." After *Mapp* at the latest, the states could no longer rely on the continuing validity of *Schwartz* in obtaining or introducing evidence in criminal prosecutions. Accordingly, we submit that *Lee* is so plainly entitled to full retroactive effect that although the issue is important, further argument on the point seems unnecessary. Compare *Daegele v. Kansas*, 375 U.S. 1; *Doughty v. Maxwell*, 376 U.S. 202; *Jackson v. Denno*, 378 U.S. 368. On the other hand, there is no instance in which this Court has held without plenary consideration that one of its decisions should be *denied* retroactive effect. Accordingly, if the issue raised by respondent is deemed to have substance, certiorari should be granted, with direction to brief it, as in *Tehan v. Shott*, 381 U.S. 923.

Respectfully submitted,

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Attorneys for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 249

HAROLD C. FULLER, *Petitioner,*

v.

STATE OF ALASKA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

PETITION FOR REHEARING

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Attorneys for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 249

HAROLD C. FULLER, *Petitioner,*

v.

STATE OF ALASKA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

PETITION FOR REHEARING

On October 28, 1968, this Court granted the Petition for a writ of certiorari and summarily affirmed the judgment of the Supreme Court of Alaska in this case. The Court agreed with petitioner that "the decision of the Alaska Supreme Court cannot stand * * * if *Lee* [*v. Florida*, 392 U.S. 378] is to be applied retroactively," because *Lee* had overruled *Schwartz v. Texas*, 344 U.S. 199, on which the judgment affirming petitioner's conviction was based. But the Court held that *Lee* was not to be applied retroactively, even in this direct review proceeding, and affirmed the judgment on that basis. We submit that the propositions decided by this Court are of such complexity and importance that summary disposition was unwarranted.

1. That the questions decided in the October 28 opinion merit plenary consideration appears from two cases in which certiorari has already been granted, *Kaiser v. New York*, No. 62, this Term and *Desist v. United States*, No. 12, this Term. The retroactivity of Lee is discussed at considerable length by the parties in *Kaiser*. See Brief for Petitioner, pp. 52-58 and Brief for Respondent, pp. 80-91. A subject which counsel on both sides regard as worthy of such presentation can hardly be covered adequately in a Reply to an Opposition to a Petition for Certiorari, yet it was the Opposition which first brought the issue into this case.[1] *Kaiser* also presents the closely related questions of the retroactivity of *Berger v. New York*, 388 U.S. 41 and *Katz v. United States*, 389 U.S. 347. The retroactivity of *Katz* is also a major issue in *Desist v. United States, supra*. In *Desist*, petitioner filed a supplemental reply brief, whose main objective was to escape the impact of the Court's opinion herein, and the government in turn relied heavily on this case in oral argument.[2] It reverses the normal process of adjudication to formulate rules of decision by summary disposition and then to follow these in

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[1] Theoretically, the retroactivity of *Lee* could have been discussed in the Petition for Certiorari. But we regard it as the function of such a Petition to concentrate upon the issues decided by the Court whose judgment is sought to be reviewed, rather than to anticipate new grounds for affirmance that a respondent may advance, and to suggest that these present further grounds for granting certiorari.

[2] Petitioner's Supplemental Reply Brief in *Desist* purports to describe telephone conversations with Washington counsel in the present case, and predicates thereon the argument that it can be limited to its own facts. Since it is clear from the Court's opinion herein that it did not undertake to decide for itself whether there was an underlying violation of Section 605 of the Communications Act, and since, as we explained in prior submissions, that is a question that should initially be decided by the Alaska Supreme Court, we deem it sufficient to state, without further burdening the Court with non-record matters, that the *Desist* brief does not describe these conversations accurately or completely.

cases which are given plenary consideration. The very purpose of the rules providing for briefs on the merits and oral argument is to give this Court the opportunity to decide important questions on the basis of fully developed presentation of the issues. Submissions on a Petition for Certiorari cannot perform this function – and indeed may be a disservice to the Court if they are too elaborate.

2. In our discussion of the retroactivity issue in our reply memorandum we urged, on the basis of our reading of *Lee*, that after *Mapp v. Ohio*, 367 U.S. 643, "the states could no longer rely on the continuing validity of *Schwartz* in obtaining or introducing evidence in criminal prosecutions." That contention has now been rejected. We would not petition for rehearing simply to request a reconsideration of the conclusion that *Mapp* did not strip *Schwartz* of all vitality as a precedent; but this Court's reasoning in *Lee* clearly implied that the overruling of *Schwartz* was compelled by prior precedent, and in *Johnson v. New Jersey*, 384 U.S. 719, 731, the Court spoke of the application of retroactivity to achieve "the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed." Thus, accepting that *Schwartz* did retain validity after *Mapp*, it does not automatically follow that *Lee* is properly denied retroactivity. For *Johnson* creates an added dimension to the "reliance" issue – a dimension that could not be developed within the confines of a reply to a brief in opposition.

In *Johnson* the Court said: "As for the standards laid down one week ago in *Miranda v. Arizona*, 384 U.S. 536, if we were persuaded that they had been fully anticipated by the holding in *Escobedo v. Illinois*, 378 U.S. 478, we would measure their prospectivity from the same date. Defendants

still to be tried at that time would be entitled to strict observance of constitutional doctrines already clearly foreshadowed." 384 U.S. at 734.[3] The Court decided, however, that *Miranda* laid down "additional guidelines to situations not presented by" *Escobedo*, and that these guidelines would be available only to persons whose trials had not begun as of the date *Miranda* was decided. *Johnson* is the only case which even touches on the effect to be given a decision of this Court which builds upon a prior change in doctrines. Yet that problem will recur continually with respect to refinements and extensions of the important decisions of this Court.[4]

Mathis v. United States, 391 U.S. 1, may serve as an example. *Mathis* followed *Miranda*, but on different facts; some members of the court believed that it expanded the principle of that decision. If a lower court is faced with a case identical with *Mathis*, the trial of which began between June 13, 1966, the date *Miranda* was decided, and May 6, 1968, the date *Mathis* was decided, should it give effect to *Mathis*?

3. The Court decided, without elaboration, "that the *Lee* rule is to be applied only to trials in which the evidence is sought to be introduced after the date of the decision in *Lee*." Consequently, the present petitioner was denied benefits of *Lee* although his case came here on direct review. A similar approach was followed in *Johnson v. New Jersey, supra; Stovall v. Denno, supra;* and *DeStefano v. Woods*, 392 U.S. 631, 635. On the other hand, *Linkletter v. Walker*, 381 U.S. 619 and *Tehan v. Shott*, 382 U.S. 406, distinguished

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[3] The court earlier referred to the "justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed." *id* at 731.

[4] As *Stovall v. Denno*, 388 U.S. 293 illustrates, the retroactivity problem is not limited to decisions which in terms overrule prior precedents.

between cases which were pending on direct review and those in which the new doctrine was sought to be applied in cases where the conviction had already become final. While *Johnson, Stovall* and *DeStefano* all recognized that their approach differed from that taken in *Linkletter* and *Griffin*, they did not expressly overrule those decisions, and we do not believe (despite the Government's oral argument in *Desist, supra*) that this Court's opinions can properly be interpreted to have abandoned the distinction. Rather they apply retroactivity on a case-by-case basis with special attention to the nature of the rule and the practical consequences of retroactivity. Thus, there are variants regarding the cut-off date even among the decisions which denied retroactivity to defendants whose cases were pending on appeal when the new rule was announced.

We submit that where retroactivity is to be limited, the distinction between cases which are pending on direct review and those where the new principle is sought to be raised in post-conviction proceedings will often be the most satisfactory. For that distinction rests on the concept of finality which is one of the "considerations of convenience, of utility, and of the deepest sentiments of justice" which must be the ultimate guide, cf. Cardozo, *The Nature of Judicial Process*, Lecture IV. To be sure, finality in criminal prosecutions has lost some of its significance since *Fay v. Noia*, 372 U.S. 391; but that case is hardly authority for the proposition that it is just to treat differently two defendants who are similarly situated, except that the case of one rather than the other has become the vehicle for the overruling of an earlier decision, which both had challenged at every available opportunity. Compare 372 U.S. at 441. This is not to suggest that *Stovall* and *Johnson* were wrongly decided; but it is to urge that only the severest practical exigencies can justify denying effect to a decision of this Court in other cases which have raised the same question before a conviction has become final. Since violations of §605 by law enforcement officials were not as prevalent as,

for example, interrogations which did not anticipate *Miranda*, no such drastic limitation of *Lee* is required. Moreover, unless *Linkletter* has been overruled *sub silentio*, its approach should govern here, for *Lee* is more analogous to *Mapp* than to any other overruling decision.

4. In the final analysis, the retroactivity problem is one of the effect to be given to the constitutional precedents of this Court. When this Court holds that a new constitutional principle is not to be followed by lower courts with respect to some cases in which that rule is invoked, it establishes an exception to the general requirement of obedience to its precedents. That principle is not an absolute, and may be overridden by considerations of greater force; and we do not challenge the judgment that these were present in each of the cases which have limited retroactivity. But the instances in which full effect is not given to this Court's precedents should be rare and clearly defined; otherwise the lower courts will be called upon to inquire on every occasion on which they are confronted with a claim under a new rule whether that rule or the old one is to govern the disposition of the case before them. Unless the lower courts are to be encouraged to experiment with avoidance of this Court's precedents, the circumstances on which they are not binding should be few, and clearly articulated. Such guidance should be given promptly. For the reasons stated earlier in the brief, we submit that this case is an appropriate vehicle for this purpose, and that rehearing should be granted. Failing that, we urge that the Court address itself fully to these questions in the pending

cases in which certiorari has already been granted (*Desist* and *Kaiser, supra*) and that this Petition be held in abeyance pending disposition of these cases.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

FULLER *v.* ALASKA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA.

No. 249. Decided October 28, 1968.

PER CURIAM.

Petitioner was convicted of shooting with intent to kill or wound and was sentenced to 10 years in prison. Over petitioner's objection that it was obtained in violation of § 605 of the Federal Communications Act, 48 Stat. 1064, 47 U. S. C. § 605, the prosecution introduced in evidence a telegram allegedly sent by petitioner to an accomplice. The Supreme Court of Alaska affirmed, holding that it need not decide whether § 605 had actually been violated since the evidence was in any event admissible in state trials under *Schwartz* v. *Texas*, 344 U. S. 199.

In *Lee* v. *Florida*, 392 U. S. 378, we overruled *Schwartz* v. *Texas* and held that evidence violative of § 605 is not admissible in state criminal trials. The decision of the Alaska Supreme Court cannot stand, therefore, if *Lee* is to be applied retroactively. We hold, however, that the exclusionary rule of *Lee* is to be given prospective application, and accordingly, we affirm.

Prospective application of *Lee* is supported by all of the considerations outlined in *Stovall* v. *Denno*, 388 U. S. 293, 297.[1] The purpose of *Lee* was in no sense "to enhance the reliability of the fact-finding process at

[1] These considerations were more recently applied in *DeStefano* v. *Woods*, 392 U. S. 631, 633, in which we concluded that the right to a jury trial in state criminal prosecutions under *Duncan* v. *Louisiana*, 391 U. S. 145, and *Bloom* v. *Illinois*, 391 U. S. 194, was prospective only.

trial." *Johnson* v. *New Jersey*, 384 U. S. 719, 729. Like *Mapp* v. *Ohio*, 367 U. S. 643, *Lee* was designed to enforce the federal law.[2] *Linkletter* v. *Walker*, 381 U. S. 618, 639. And evidence seized in violation of the federal statute is no less relevant and reliable than that seized in violation of the Fourth Amendment to the Constitution. Moreover, the States have justifiably relied upon the explicit holding of *Schwartz* that such evidence was admissible.

Retroactive application of *Lee* would overturn every state conviction obtained in good-faith reliance on *Schwartz*. Since this result is not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee*.

The petition for a writ of certiorari is granted, and the judgment of the Supreme Court of Alaska is affirmed.

MR. JUSTICE BLACK dissents for the reasons set out in his dissenting opinion in *Linkletter* v. *Walker*, 381 U. S. 618, 640. But see dissent, BLACK, J., in *Lee* v. *Florida*, 392 U. S. 378, 387.

MR. JUSTICE DOUGLAS, believing that the rule of *Lee* v. *Florida*, 392 U. S. 378, which was applied retroactively in that case, should be applied retroactively in other cases too, dissents.

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[2] *Lee* v. *Florida*, 392 U. S., at 386–387:

"We conclude, as we concluded in *Elkins* and in *Mapp*, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law 'in the only effectively available way—by removing the incentive to disregard it.'" *Elkins* v. *United States*, 364 U. S., at 217.